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**IN THE
COURT OF CRIMINAL APPEALS
OF TEXAS**

FILED
COURT OF CRIMINAL APPEALS
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DEANA WILLIAMSON, CLERK

CARLOS LOZANO **APPELLANT**

V.

THE STATE OF TEXAS **APPELLEE**

THE STATE'S BRIEF ON PETITION FOR DISCRETIONARY REVIEW

**FROM THE COURT OF APPEALS, EIGHTH DISTRICT OF TEXAS
CAUSE NUMBER 08-17-00251-CR**

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TRIAL COURT: 384th Judicial District Court of El Paso County, Texas, Honorable Patrick Garcia, presiding

COURT OF APPEALS: Eighth Court of Appeals, Honorable Senior Judge Ann C. McClure (sitting by assignment), Justice Yvonne T. Rodriguez, and Justice Gina M. Palafox

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STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Carlos Lozano, Appellant, was indicted for murder. (CR1: 9).[1] A jury found Appellant guilty as charged in the indictment. (RR10: 81).[2] Appellant elected to have the court assess punishment and was sentenced to confinement for 25 years in the Texas Department of Criminal Justice Institutional Division. (CR2: 796-97; RR11: 19). Appellant timely filed a motion for new trial, (CR2: 801-4), and notice of appeal. (CR2: 811-12). The trial court certified Appellant's right to appeal. (Supp. CR: 9-10).

On October 31, 2019, in an unpublished opinion, the Eighth Court of Appeals reversed Appellant's conviction and remanded the case for a new trial. *See Lozano v. State*, No. 08-17-00251-CR, 2019 WL 5616975, at *13 (Tex.App.–El Paso Oct. 31, 2019, pet. granted)(not designated for publication). Specifically, the Eighth Court held that the trial court's instruction to the jury that Appellant had a general duty to retreat before he could justifiably use deadly force

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[1] Throughout this petition, references to the record will be made as follows: references to the clerk's record will be made as "CR" and volume and page number, references to the supplemental clerk's record will be made as "Supp. CR" and page number, references to the reporter's record will be made as "RR" and volume and page number, and references to exhibits will be made as either "SX" or "DX" and exhibit number.

[2] Prior to opening statements, the State abandoned paragraphs C and D of the indictment. (RR7: 14-15).

to protect himself against the victim's attack resulted in egregious harm. *See id.* at *1, 3. The State timely filed a motion for rehearing on November 15, 2019. On December 11, 2019, the Court of Appeals denied the State's motion for rehearing without opinion. The State timely filed a motion for extension of time to file a petition for discretionary review, which was granted by this Court.

The State timely filed its petition for discretionary review (PDR) on January 31, 2020. This Court granted the State's PDR on May 6, 2020, with the notation that oral argument will not be permitted.

SOLE GROUND FOR REVIEW

The Eighth Court of Appeals erred in its preliminary holding that Appellant was entitled to jury instructions on the use of deadly force in self-defense because there was no evidence presented from any source of Appellant's subjective state of mind at the time of the shooting, that is, whether he was in immediate apprehension or fear that the deceased was about to kill or seriously injure him at the time he shot the deceased, such that Appellant was not entitled to any self-defense instructions. Therefore, any errors in the self-defense instructions actually submitted did not result in egregious harm because Appellant was not entitled to the self-defense instructions in the first place.

STATEMENT OF FACTS

In the early morning hours of September 26, 2015, in the parking lot outside of Pockets Billiards and Fun, a bar and pool hall located in El Paso, Texas, Jorge Hinojos ("Hinojos") punched Carlos Lozano, Appellant, as Appellant sat in his vehicle. (RR7: 46, 68, 98-100, 114, 132-33, 157, 166). In response, Appellant shot Hinojos three times, killing him. (RR7: 69, 102, 114, 133; RR8: 17-18).

Earlier that evening, Appellant went to Pockets Billiards to meet Fernanda Avila ("Avila"), who he was dating at the time. (RR7: 46; RR8: 83, 88). While there, Appellant, Avila, and a friend were drinking and having a great time. (RR8: 94). Around the time their friend left, another group of people joined them, and by this time, Avila and Appellant were "too drunk." (RR8: 95). One of the men in the group started talking to Avila, which upset Appellant, who became aggressive and told the man to "move." (RR8: 40-41, 47-48, 53, 55, 95-96). Appellant said "something about that if he [the man] didn't stop then there would be something like blood." (RR8: 49). Because the situation was getting tense, the man who was talking to Avila left. (RR8: 50).

On that same night, Hinojos, his girlfriend Diana Ruiz ("Ruiz"), and their friend Carolina Rocha ("Rocha") also went to Pockets Billiards, arriving around midnight. (RR7: 60, 147-48). The Hinojos group ran into some acquaintances,

including David Torres ("Torres"), and the two groups joined up for the evening. (RR7: 61, 107-8, 149). Between 2:00 a.m. and 2:15 a.m., which was just past closing time, the combined group left Pockets Billiards. (RR7: 46, 62, 109, 149). As Rocha, who was texting on her phone, was walking to her car in the parking lot, she was almost hit by a fast-moving pickup truck driven by Appellant, but both were able to stop in time. (RR7: 65, 88-89, 111, 154-55). Rocha, who first noticed the truck by its headlights, was scared by the encounter but merely looked at the driver, whom she later identified at trial as Appellant, and did not say anything to him. (RR7: 155-56). Upon stopping, Appellant rolled down the driver's side window of the truck and stared at Rocha and her group in an ugly and/or intimidating manner. (RR7: 66, 68, 155, 173). Somebody from the group told Appellant "to watch out, like, to see what he was doing," and "what were you thinking? Be careful," but Appellant did not respond. (RR7: 66, 156-57). Appellant specifically stared at Ruiz, and at this point, Hinojos got upset because Ruiz was his girlfriend. (RR7: 113). Through the open, passenger-side window of Appellant's truck, Torres asked Appellant to leave because there were several of them and he did not want any problems. (RR7: 113, 130-31). As Torres was talking to Appellant, Hinojos threw a full can of beer at Appellant through the open, passenger-side window, and the beer spilled inside the truck. (RR7: 66-67,

96, 113-14, 130, 157). It is unknown if the beer can actually hit Appellant. Appellant then retrieved a gun from his backpack and pointed it through the open, passenger-side window at Torres, who again asked him to leave, stating, "[h]ey, why are you going to do that? You better leave. Don't scare me with that gun." (RR7: 114).

Meanwhile, Hinojos, who had not seen the gun, went around the rear of the truck to the driver-side window and punched Appellant, who was seated in the driver's seat of the truck, in either the face or shoulder with a closed fist at least once, and possibly two or three times, through the open window. (RR7: 68, 98-100, 114, 157). At all times, neither Hinojos nor anyone else from his group ever tried to enter Appellant's truck. (RR7: 77, 100, 132-33, 172). After the punch(es), Ruiz tried to get Hinojos to leave, and that is when Appellant shot Hinojos, who was unarmed, three times. (RR7: 69, 99, 102, 114, 158). As he was being shot, Hinojos turned his back to Appellant, pushed Ruiz away, and then fell to the ground. (RR7: 69, 104). Appellant then sped away and fled to Mexico. (RR7: 69).[3] Ruiz helped put Hinojos in Rocha's car, and they took him to the nearest hospital,

[3] Appellant fled to Mexico immediately after the shooting. His crossing history showed that he crossed from the United States into Mexico at the Bridge of the Americas at 2:24 a.m. on September 26, 2015, which was only minutes after the shooting. (RR8: 178-80; SX 151-52).

where he later died from his wounds. (RR7: 69-70, 102, 115, 158-59; RR8: 17-18).

Appellant never said a word as the events unfolded, never gave a statement to the police,[4] and did not testify at trial. Nor did any witness describe Appellant's demeanor at the time he pulled the trigger, shooting Hinojos three times and killing him.

The trial court included "retreat" language in the application portion, parts XIII and XIV, of the jury instructions. Specifically, in part XIII, the trial court instructed the jury as follows:

> Now if you find from the evidence beyond a reasonable doubt that on the occasion in question the defendant, Carlos Lozano, did shoot Jorge Hinojos with a firearm as alleged, but you further find from the evidence that, viewed from the standpoint of the defendant that his life or person was in danger and there was created in his mind a reasonable expectation or fear of death or serious bodily injury from the use of unlawful deadly force at the hands of Jorge Hinojos or others, if any, and that acting under such apprehension, he reasonably believed that the use of deadly force on his part was immediately necessary to protect him against Jorge Hinojos or others, if any, use or attempted use of unlawful deadly force, and he shot the said Jorge Hinojos *and that a reasonable person in defendant's situation would not have retreated*, then you should acquit the defendant on the grounds of self defense; or if you have reasonable doubt as to whether or not the defendant was acting in self-defense on the occasion and under the circumstances, then you should give the benefit of that doubt to defendant and find him not guilty. (Verdict Form A) (CR2: 789-90; RR10: 14-15).

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[4] Appellant returned from Mexico to the United States and turned himself in to authorities on January 7, 2016. (RR9: 23-24).

(emphasis added)

In part XIV, the trial court instructed the jury as follows:

> If you find from the evidence beyond a reasonable doubt (1) that at the time and place in question the defendant did not reasonably believe that he was in danger of death or serious bodily injury; *(2) that a reasonable person in defendant's situation, at such time and place, would have retreated before using deadly force against Jorge Hinojos*; or (3) that defendant, under the circumstances, did not reasonably believe that the degree of force actually used by him was immediately necessary to protect himself against Jorge Hinojos or others, if any, use or attempted use of unlawful deadly force, if any, as viewed from defendant's standpoint, at the time, then you must find against the defendant on the issue of self-defense. (CR2: 790: RR10: 15-16). (emphasis added)

Neither party objected to parts XIII and XIV of the jury instructions. (RR10: 4-5).

SUMMARY OF THE STATE'S ARGUMENTS

By preliminarily holding that Appellant was entitled to deadly-force self-defense instructions when there was no evidence from any source as to Appellant's subjective state of mind or observable manifestations of his subjective state of mind, that is, whether he had an immediate apprehension or fear that Hinojos was about to kill or seriously injury him, at the time Appellant shot Hinojos, the Eighth Court did not apply the subjective prong of self-defense and erred in holding that Appellant was entitled to deadly-force self-defense instructions.

Although numerous eye-witnesses testified, all they testified to were the facts of the shooting itself, and there was no evidence presented as to anything Appellant said at the time of the shooting or to Appellant's demeanor at the time he pulled the trigger that would have showed whether he had an immediate apprehension or fear. And because there was no observable manifestation or evidence of Appellant's subjective state of mind at the time of the shooting, he was not entitled to any self-defense instructions. Therefore, any errors in the self-defense instructions actually given did not result in egregious harm because Appellant was not entitled to the instructions in the first place.

For these reasons, the Eighth Court erred in its preliminary holding that Appellant was entitled to deadly-force self-defense instructions and in its holding that Appellant suffered egregious harm due to the deadly-force self-defense instructions as given. For these reasons, this Court should reverse the Eighth Court's judgment as to this issue and affirm Appellant's conviction.

ARGUMENT AND AUTHORITIES

SOLE GROUND FOR REVIEW: The Eighth Court of Appeals erred in its preliminary holding that Appellant was entitled to jury instructions on the use of deadly force in self-defense because there was no evidence presented from any source of Appellant's subjective state of mind at the time of the shooting, that is, whether he was in immediate apprehension or fear that the deceased was about to kill or seriously injure him at the time he shot the deceased, such that Appellant was not entitled to any self-defense instructions. Therefore, any errors in the self-defense instructions actually submitted did not result in egregious harm because Appellant was not entitled to the instructions in the first place.

Despite there being no evidence from any source of Appellant's subjective state of mind, that is, whether he was actually in immediate apprehension or fear that the deceased was about to kill or seriously injure him at the time Appellant pulled the trigger, the Eighth Court preliminarily held Appellant was entitled to jury instructions on the use of deadly force in self-defense and further held that errors in the self-defense instructions (which erroneously included duty-to-retreat language) caused Appellant egregious harm, thereby requiring reversal. *See Lozano*, 2019 WL 5616975, at *5, 12-13. However, there was no evidence presented from any source as to whether Appellant was in immediate apprehension or fear that the deceased was about to kill or seriously injure him at the time he shot the deceased, such that Appellant was not entitled to any self-defense instructions. As such, any errors in the self-defense instructions actually submitted

did not result in egregious harm because Appellant was not entitled to the instructions in the first place.

I. The law of self-defense

Self-defense is a justification for conduct that would otherwise be criminal. TEX. PENAL CODE §§ 9.02, 9.31, 9.32. "A defendant is entitled to an instruction on self-defense if the issue is raised by the evidence, whether that evidence is strong or weak, unimpeached or contradicted, and regardless of what the trial court may think about the credibility of the defense." *Ferrel v. State*, 55 S.W.3d 586, 591 (Tex.Crim.App. 2001). The record must contain some evidence, when viewed in the light most favorable to the defendant, that will support the claim. *See Ferrel*, 55 S.W.3d at 591. "[A] defense is supported (or raised) by the evidence if there is some evidence, from any source, on each element of the defense that, if believed by the jury, would support a rational inference that that element is true." *Shaw v. State*, 243 S.W.3d 647, 657-58 (Tex.Crim.App. 2007). A defensive issue is "raised by the evidence" if there is sufficient evidence to permit a reasonable jury to find in the defendant's favor on the issue. *See Ferrel*, 55 S.W.3d at 592. A defendant need not testify for a defensive issue to be sufficiently raised. *See Smith v. State*, 676 S.W.2d 584, 585-87 (Tex.Crim.App. 1984). Defensive issues may be raised by the testimony of any witness, even one called by the State. *See Woodfox v.*

State, 742 S.W.2d 408, 10 (Tex.Crim.App. 1987). But "if the evidence, viewed in the light most favorable to the defendant, does not establish self-defense, the defendant is not entitled to an instruction on the issue." *Ferrel*, 55 S.W.3d at 591.

II. This Court has long held that the law of self-defense includes both subjective and objective components.

As applicable here, a person is justified in using deadly force in self-defense when and to the degree he reasonably believes deadly force is immediately necessary to protect the actor against the other's use or attempted use of unlawful deadly force. TEX. PENAL CODE §§ 9.31(a), 9.32(a)(2). A "reasonable belief" is that which "would be held by an ordinary and prudent man in the same circumstances as the actor." TEX. PENAL CODE § 1.07(a)(42).

This Court has long held that the self-defense statutes (sections 9.31 and 9.32) include both subjective and objective components, as "reasonable belief" is judged both from the actor's point of view and also from the ordinary prudent-person standard. *See Werner v. State*, 711 S.W.2d 639, 645 (Tex.Crim.App. 1986)("Although the test assumes that a defendant may act on appearances as viewed from his standpoint, the test also assumes the 'ordinary prudent man test of tort law (internal citations omitted).'"), *holding modified by Hamel v. State*, 916 S.W.2d 491, 493 (Tex.Crim.App. 1996)("*Werner* should not be interpreted to

preclude a self-defense instruction where the defendant reasonably perceives that he is in danger, even though that perception may be incorrect."); *Dyson v. State*, 672 S.W.2d 460, 463 (Tex.Crim.App. 1984)("A person has a right to defend from apparent danger to the same extent as he would had the danger been real; provided he acted upon reasonable apprehension of danger as it appeared to him at the time."); *Semaire v. State*, 612 S.W.2d 528, 530 (Tex.Crim.App. 1980)("The term 'reasonably believes' encompasses the traditional holding that a suspect is justified in defending against danger as he reasonably apprehends it."); *Kolliner v. State*, 516 S.W.2d 671, 674 (Tex.Crim.App. 1974)(whether self-defense was justifiable is a question to be determined by the jury from the appellant's point of view at the time he acted).

Thus, in order to justify the submission of a jury charge on the issue of self-defense, there must be some evidence in the record that shows both: (1) a defendant's subjective state of mind, that is, whether he had some apprehension or fear of being the recipient of the unlawful use of force from another, *see Smith*, 676 S.W.2d at 585; and (2) that the defendant's subjective apprehension or fear was objectively reasonable. *See Werner*, 711 S.W.2d at 645.

III. The Eighth Court's preliminary holding that Appellant was entitled to instructions on the use of deadly force in self-defense when there was no evidence of Appellant's subjective state of mind, that is, there was no evidence that he actually had some immediate apprehension or fear that the deceased was about to kill or seriously injure him at the time he shot the deceased, conflicts with this Court's long-held precedent that under such circumstances, self-defense instructions are not warranted.

As discussed above, in order to be entitled to self-defense jury instructions at trial, there must be some evidence in the record of the defendant's subjective state of mind. *See Smith*, 676 S.W.2d at 585. In *Smith*, Smith's mother testified that Smith had told her that the complainant had been trying to hurt him, and Smith's fiancée testified that the complainant had pointed a gun at Smith and said that he was going to hurt him. *See Smith*, 676 S.W.2d at 586-87. This Court held that testimony by witnesses as to statements made by Smith during the fight, although not strong nor convincing, raised the issue of self-defense, such that the trial court erred in refusing self-defense instructions. *See Smith*, 676 S.W.2d at 586-87.

The Courts of Appeals have followed the dictates of *Smith* and held that self-defense instructions are warranted when there is an observable manifestation or evidence of the defendant's subjective state of mind adduced at trial. *See, e.g., VanBrackle v. State*, 179 S.W.3d 708, 714 (Tex.App.–Austin 2005, no pet.)(where witnesses testified that the complainant pointed a gun at the appellant, who called

for help and disarmed the complainant, and where additional testimony indicated that the complainant was reaching into his pocket as if to pull out another object when he was shot by the appellant, who did not testify, the court held that the appellant's call for help was an observable manifestation of his belief that it was necessary to defend himself against the pointed gun and that shooting the complainant was some evidence of the believed necessity to protect himself, such that the issue of self-defense was properly raised); *Wright v. State*, No. 13-19-00238-CR, 2020 WL 1302514, at *3-4 (Tex.App.–Corpus Christi Mar. 19, 2020, no pet. h.)(mem.op., not designated for publication)(holding that the trial court erred when it denied the appellant a requested deadly-force self-defense instruction because the appellant offered some evidence – the appellant's grand-jury testimony that he believed the victim to be on drugs, that the victim did not pause when the appellant pointed a gun at him, that the appellant was stuck and could not escape, that the appellant could not tell if the victim was holding a weapon, and that the victim stepped forward as if he was going to attack the appellant – to raise an issue as to whether he reasonably believed that the use of deadly force was immediately necessary, such that the issue of self-defense was properly raised).

Conversely, when there is no evidence in the record showing the defendant's subjective state of mind, the Courts of Appeals have followed *Smith* and held that the issue of self-defense is not raised, such that self-defense instructions are not warranted. *See, e.g., Reed v. State*, 703 S.W.2d 380, 384-85 (Tex.App.–Dallas 1986, pet. ref'd)(holding, where the evidence showed that when officers executed a "no-knock" search warrant at the appellant's home, an officer attempted to forcefully enter a bathroom with a closed door and that the appellant fired and wounded an officer as the officers entered, that no evidence was adduced as to the appellant's state of mind or observable manifestations of the appellant's state of mind, that is, there was no evidence the appellant acted upon a reasonable apprehension of danger as it appeared to him at the time of the shooting, such that he was not entitled to self-defense jury instructions); *Alaniz v. State*, No. 01-18-00599-CR, 2020 WL 97177, at *3-4 (Tex.App.–Houston [1st Dist.] Jan. 9, 2020, no pet.)(mem.op., not designated for publication)(explaining that when a defendant does not testify, there still must be some evidence of the defendant's subjective belief that deadly force was immediately necessary to protect himself to justify the submission of a self-defense charge and that the record must contain some evidence or observable manifestation of the defendant's state of mind at the time of the alleged act of self-defense, such as a call for help during the altercation

or telling the victim that the defendant does not want to fight; affirming the trial court's refusal to submit self-defense instructions because there was no observable manifestation of the defendant's state of mind at the time of the alleged act of self-defense); *Martinez v. State*, No. 02-18-00073-CR, 2019 WL 2134126, at *9 (Tex.App.–Fort Worth May 16, 2019, pet. ref'd)(mem.op., not designated for publication)(evidence did not show the appellant's subjective state of mind – that he was in immediate apprehension or fear that the decedent was about to kill or seriously injury him – after being slapped by the decedent, such that the trial court did not err by denying a deadly-force self-defense jury instruction); *Vega v. State*, No. 05-16-00882-CR, 2017 WL 1245423, at *2 (Tex.App.–Dallas Apr. 5, 2017, no pet.)(mem.op., not designated for publication)(holding, where the evidence showed that the victim used force to flip a bed towards the appellant and that in response, the appellant punched, kicked, and grabbed the victim, but where no evidence was presented that the use of force against him placed the appellant in some immediate apprehension or fear, and the only evidence of the appellant's subjective state of mind was that he was angry, mad, and enraged, that the trial court did not err by refusing to give self-defense jury instructions); *Ivy v. State*, No. 07-15-00023-CR, 2016 WL 6092524, at *3 (Tex.App.–Amarillo Oct. 17, 2016, no pet.)(mem.op., not designated for publication)(holding, where the

evidence showed that the victim pushed and slapped the appellant in an effort to get her phone back and that, in response, the appellant pushed the victim to the ground, stepped on her stomach and ribs, and struck her twice in the face, but where the evidence only showed the appellant's state of mind [shaken up, angry, and upset] an hour after the incident and nothing showed any observable manifestation of the appellant's state of mind at the time of the incident, that even though the victim may have struck the appellant first, this provided no clue as to the appellant's subjective state of mind, such that the trial court did not err by denying a self-defense jury instruction); *Alexander v. State*, No. 03-14-00290-CR, 2016 WL 286385, at *4 (Tex.App.–Austin Jan. 21, 2016, pet. ref'd)(mem.op., not designated for publication)(holding that the evidence showing that the victim, who was angry and upset during the altercation, injured the appellant as they fought when she bit his arm, cut his lip, and punched him, without more, did not establish anything regarding the appellant's subjective state of mind during the fight, such that there was no evidence from which a reasonable fact finder could infer that the appellant was in apprehension or fear of the victim at any point during the fight or that the appellant had a reasonable belief that his use of force was immediately necessary to protect himself, such that the trial court did not err by denying a self-defense jury instruction); *James v. State*, No. 02-06-373-CR, 2007 WL 1649916,

at *3-4 (Tex.App.–Fort Worth June 7, 2007, pet. ref'd)(mem.op., not designated for publication)(holding, where the evidence showed that after the victim pushed the appellant to get away from him, the appellant pushed, slapped, and hit her, but where the record contained no direct evidence of the appellant's subjective state of mind nor evidence of an observable manifestation of his subjective state of mind at the time he used force against the victim, that the trial court did not err by denying a self-defense jury instruction).

Here, just as in the above cases finding no observable manifestation of the defendant's subjective state of mind, even when responding to some level of provocation or force by a complainant, there also was no evidence from any source as to Appellant's subjective state of mind or observable manifestation of his subjective state of mind, that is, whether he had an immediate apprehension or fear that Hinojos was about to kill or seriously injury him, at the time Appellant shot Hinojos. Although numerous eye-witnesses testified, all they testified to were the facts of the shooting itself. (RR7: 68-69, 98-100, 102, 114, 157-58). No one testified as to anything Appellant said at the time of the shooting or to Appellant's demeanor at the time he pulled the trigger. In other words, there was no direct evidence or observable manifestation of Appellant's subjective state of mind at the time he pulled the trigger. In fact, similar to the *Vega* case cited above, the only

observable manifestation of Appellant's subjective state of mind that night showed that he was aggressive, angry, and likely intoxicated hours before the shooting, (RR8: 40-41, 47-49, 53, 55, 95-96), and belligerent (staring at the group in an ugly and/or intimidating manner) moments before the shooting. (RR7: 66, 68, 155, 173). However, no evidence showed that Appellant was in immediate apprehension or fear that Hinojos (or anyone else, for that matter) was about to kill or seriously injury him at the moment he shot Hinojos. Simply, absent any observable manifestation or evidence of Appellant's actual, subjective state of mind, specifically, evidence that he was actually in fear of imminent death or serious bodily injury, no further inquiry into whether any such apprehension or fear was objectively reasonable is warranted – or even possible.

As such, the Eighth Court erred when it did not consider the complete lack of evidence, from any source, of Appellant's subjective state of mind at the time he pulled the trigger in concluding that Appellant was entitled to instructions on the use of deadly force in self-defense. *See Lozano*, 2019 WL 5616975, at *5, 12-13. This failure to consider Appellant's subjective state of mind conflicts with this Court's decisions in *Smith* and *Werner* that control when self-defense instructions are warranted. *See Smith*, 676 S.W.2d at 585 (in order to justify the submission of a jury charge on the issue of self-defense, there must be some evidence in the

record that shows a defendant's subjective state of mind, that is, whether he had some apprehension or fear of being the recipient of the unlawful use of force from another); *Werner*, 711 S.W.2d at 645 (in order to obtain a jury instruction on the issue of self-defense, there must be some record evidence that the defendant's subjective apprehension or fear was objectively reasonable). The Eighth Court's decision also conflicts with the Courts of Appeals decisions cited above that do follow this Court's analysis and holdings in *Smith. See Reed*, 703 S.W.2d at 384-85; *Alaniz*, 2020 WL 97177, at *3-4; *Martinez*, 2019 WL 2134126, at *9; *Vega*, 2017 WL 1245423, at *2; *Ivy*, 2016 WL 6092524, at *3; *Alexander*, 2016 WL 286385, at *4; *James*, 2007 WL 1649916, at *3-4.

IV. Because Appellant was not entitled to deadly-force self-defense instructions, he was not egregiously harmed by any error in the self-defense instructions actually given.

Because Appellant was not entitled to jury instructions on the use of deadly force in self-defense, he could not be harmed, much less egregiously harmed, by the self-defense jury instructions actually submitted, even if erroneously worded or defectively incorporated into the application paragraphs of the trial court's charge. *See Hughes v. State*, 897 S.W.2d 285, 301 (Tex.Crim.App. 1994)(where defendant was not entitled to a mitigating-evidence instruction, any error in the instruction given by the trial court was harmless because it could not have

contributed to the jury's answers to the special issues); *Torres v. State*, No. 08-13-00027-CR, 2016 WL 5404773, at *3-5 (Tex.App.–El Paso Sept. 28, 2016, pet. ref'd)(not designated for publication)(explaining that if a defendant is not entitled to a self-defense instruction, but the trial court nevertheless gives the instruction, any error in the instruction is harmless). For all of these reasons, Appellant was not egregiously harmed by the deadly-force self-defense jury instructions, and the Eighth Court erred when it held otherwise.

V. Conclusion

Because there was no observable manifestation or evidence of Appellant's subjective state of mind at the time of the shooting, that is, whether he was in immediate apprehension or fear that Hinojos was about to kill or seriously injure him at the time Appellant shot him, Appellant was not entitled to any self-defense instructions. Therefore, any errors in the self-defense instructions actually submitted did not result in egregious harm because Appellant was not entitled to the instructions in the first place. For these reasons, the Eighth Court erred in its preliminary holding that Appellant was entitled to deadly-force self-defense instructions and in its holding that Appellant suffered egregious harm. For these reasons, this Court should reverse the Eighth Court's judgment as to this issue and affirm Appellant's conviction.

PRAYER

WHEREFORE, the State prays that this Court reverse the Eighth Court's judgment, hold that the trial court did not commit egregious error in its jury charge, and affirm Appellant's conviction.

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CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the foregoing document, beginning with the statement of facts on page 1 through and including the prayer for relief on page 21, contains 4,651 words, as indicated by the word-count function of the computer program used to prepare it.

/s/ Ronald Banerji
RONALD BANERJI

CERTIFICATE OF SERVICE

(1) The undersigned does hereby certify that on June 18, 2020, a copy of the foregoing petition for discretionary review was sent by email, through an electronic-filing-service provider, to Appellant's attorney: Kenneth Del Valle, kendelvalle@aol.com.

(2) The undersigned also does hereby certify that on June 18, 2020, a copy of the foregoing petition for discretionary review was sent by email, through an electronic-filing-service provider, to the State Prosecuting Attorney, information@SPA.texas.gov.

/s/ Ronald Banerji
RONALD BANERJI

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

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Associated Case Party: Carlos Lozano

Name	BarNumber	Email	TimestampSubmitted	Status
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Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
State ProsecutingAttorney		information@SPA.texas.gov	6/18/2020 5:19:14 PM	SENT